

No. 10573

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, APPELLANT

v.

MERCHANTS TRANSFER & STORAGE CO. ET AL., APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN
DIVISION

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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Herein the Government will reply to the arguments advanced by the appellees in their brief in support of the order of September 21, 1943 (R. 51-52) requiring the United States forthwith to return possession of the property. It will also answer their argument in support of their cross-appeal.

ARGUMENT

I

The district court lacked jurisdiction to order the United States to surrender possession under penalty of damages "as for contempt"

Appellees argue that the district court's jurisdiction to enter the order of September 21, 1943 (R. 51-52) follows from its jurisdiction in condemnation which was invoked by the United States (Br. 6-7). How-

ever, jurisdiction of condemnation proceedings is one thing and jurisdiction of proceedings against the United States for the purpose of requiring it to return possession of property under penalty of damages "as for contempt," an entirely different thing. The fatal objection in the latter case, as was pointed out in the opening brief (pp. 17-19), is the fact that the United States, which, of course, can never be sued without its consent, has never consented thereto. The *Thekla* case, 266 U. S. 327 (1924), relied upon by appellees (Br. 6), which was decided at the same term as the *Nassau Smelting Works* case, 266 U. S. 101 (1924) (see Op. Br. p. 18), has since been limited to admiralty suits. *United States v. Shaw*, 309 U. S. 495, 502-503 (1940). See also *United States v. Davidson*, 139 F. (2d) 908 (C. C. A. 5, 1943).

II

The United States is authorized to take possession of property without court order

Appellees contend in effect (Br. 5-20) that, the United States having sought and been denied a court order for immediate possession, it became bound and could not thereafter take possession of the property even if under the Second War Powers Act or otherwise it is authorized to do so without court order. This argument quite overlooks that the only effect of the denial of court order for immediate possession was to deny the United States the right to take possession under court order. The denial of the court order left the United States free to take possession thereafter without a court order if it had the authority to do so.

The Government's opening brief (pp. 19-27) shows that the United States was authorized to take possession of the property without court order, and this appellees have not refuted. Appellees' argument also very largely blinks the fact that the United States took possession of the property on September 8, 1943 (R. 25). Clearly, a denial of court order for immediate possession made on August 13, 1943 (R. 22) could not preclude the United States from taking or affect its right to take possession of the property on September 8, 1943—almost a month later—if, as was shown in the opening brief and as appellees' argument virtually admits, the United States had authority to take possession without court order. See opening brief, pp. 35-37.

Like the court below, appellees are of the erroneous belief that a taking is not valid if not preceded by payment or deposit of compensation (Br. 8-9, 10-16). This view fails to take into consideration the facts (1) that the requirements of the Constitution are wholly satisfied when provision for the payment of just compensation is made in advance of a taking, and (2) that the filing of the petition in condemnation herein constitutes such provision. See opening brief, pp. 23-25.

III

The taking of possession was not arbitrary and capricious

Appellees assert (Br. 26-27) that the findings of the court below sustain its judgment that the taking of possession was arbitrary and capricious. However, they make no attempt to refute the Government's contention (Br. 27-33) that while the district court pur-

ported to determine whether the taking of possession was arbitrary or capricious, it in fact merely substituted its determination as to the necessity for the taking for that of the Secretary of War. That the taking was not arbitrary or capricious, the findings of the court below to the contrary notwithstanding, is amply shown in the Government's opening brief (pp. 33-37).

IV

The cross-appeal must fail

Cross-appellants appealed from "that portion of the order designated as 'Order Directing Return of Property' entered September 21, 1943, * * * which ordered and decreed that [certain designated officials] were not in contempt of the Court * * *'" (R. 57-58). The court below allowed the cross-appeal from that portion of that order only (R. 58-59). Cross-appellants argue (Br. 28-30) that their motion to dismiss (R. 11-12) the condemnation proceedings should have been granted. But since the court below has not yet acted on their motion to dismiss (R. 22), and therefore the cross-appeal necessarily is only from a certain portion of the order of September 21, 1943, the cross-appeal manifestly brings before this Court no question as to the merits of the motion to dismiss the condemnation proceedings. Cross-appellants' other contention (Br. 30-33) that certain officers of the United States should have been held in contempt of the order of August 13, 1943, denying immediate possession, must fail for the same reasons which apply in the case of the United States. See opening brief, pp. 19-37.

CONCLUSION

The order below of September 21, 1943, should be reversed insofar as it purports to control the United States, the injunction against the United States revoked, and the cause remanded with directions to determine compensation for the property taken. The order should be affirmed insofar as it determined that designated officials of the United States should not be held in contempt.

Respectfully submitted.

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